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Supreme Court of the United States

OCTOBER TERM 1925

No. 268

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED,
Respondent,

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

STATEMENT OF CASE.

The Respondent, as Special Administratrix of William Coogan, deceased, brought this action in the District Court of Dakota County, Minnesota, on behalf of herself and her six minor children to recover from the petitioner for the wrongful death of William Coogan, the husband and father.

The Respondent had a verdict in the trial court for $13,500.00. The Petitioner then moved for judgment notwithstanding the verdict only, which was denied, there being no motion for a new trial.

The Petitioner then appealed from the judgment entered upon the verdict to the Supreme Court of the State of Minnesota, where the judgment of the lower court was affirmed and judgment entered in the Supreme Court of the State of

Minnesota on the 13th day of November, 1924, in Respondent's favor and against Petitioner, in the sum of $14,363.29.

STATEMENT OF FACTS.

William Coogan, the deceased husband of Respondent, had been in the employ of the defendant for over fourteen years. On the 14th day of July, 1923, he came to his death while employed as a railway brakeman on what is known as defendant's freight train 92. The run of this train was from Farmington to Austin, Minnesota. Train 92 was an interstate train and at the time that Coogan was killed, was engaged in interstate commerce.

Train 92 was made up in the Yards at Farmington, Minnesota, a short time after 7 o'clock A. M. on the day in question by what is known as the switch crew, of which John Marshall was conductor, and one Dubke and Odekirk were brakemen. (Record 13).

The first movement in the making up of Train 92 was to kick the caboose belonging to this train from the lead on Track 1 in an easterly direction, the tracks at that place running easterly and westerly. Coogan rode the caboose in on Track 1 and stopped it by applying the hand brakes. (Record 13).

The next movement in the making up of this train was for the switch engine to couple on to two cars to bring them to the lead track, and while in motion cut them from the engine and kick them down on track one. Dubke rode the cars in as they were moving back in the easterly direction towards the caboose, riding the front car, and controlling their movement by hand brakes, allowing them to couple automatically to the caboose. (Record 13-22-33).

The next movement in the making up of the train was for the switch engine to couple on to nine or possibly ten cars, taking them to the lead, cutting them off from the engine, kicking them back on Track 1, in the same manner as the former cut, Dubke riding them in and allowing them to couple to the first cut of two cars. (Record 33-34).

The next movement in the making up of this train was for the switch engine to couple on to either three or four cars and move with the cars back on to Track 1 with the engine attached until they coupled on to the cars last put in. This was the final cut and constituted the entire train. (Record 34).

After this last cut of four cars had been coupled to the train they stopped the engine to see if the automatic coupling had been made. Having found it had, they found it necessary to move the entire train back in order to clear the switch, and they moved the entire string of cars back at that time in an easterly direction in the neighborhood of two car lengths. (Record 34).

They then uncoupled the switch engine from the train and the road engine was immediately coupled thereto, and when the air hose was coupled between the engine and the first car, the engineer immediately attempted to pump up the air train line, but was unable to do so for the reason that the air coupling had not been made between the last four cars put in and the second cut of ten cars put in the train. This air coupling was then made by Dubke, and when made, it was found that the air was then escaping at the rear end of the train, the air hose not having been coupled between the caboose and the car attached thereto. Dubke then started back towards the rear end of the train and when some distance back discovered the body of Coogan. (Rec-

ord 34-35-36).

It appears that it was the duty of Coogan to couple the air on this freight train and that with the exception of the coupling between the caboose and the next car thereto, the couplings had all been made prior to the accident except the coupling between the last four cars put in and the ten cars above referred to. (Record 9-10-25-41).

Coogan's body was found near the west end of the second car from the caboose. His body was lying parallel with the tracks, outside the south rail and on or just at the end of the ties. (Record 11-18-36).

The kicked up condition of the ground and the blood found just opposite the south rail of Track 1, indicated that Coogan's body had been dragged a distance of about 15 feet. (Record 38).

The rear wheel on the south side of the car coupled to the caboose had blood on it. There was no blood on any other part of the train. (Record 11-18).

A piece of Coogan's clothing was found on the bolt passing through the journal box, holding the anchor bar on the journal box of the rear wheel of the car coupled to the caboose, being the same wheel on which blood was found. (Record 19-20-31-36).

Coogan's hat, his false teeth, part of his tongue and flesh from his face was found between the rails of the track; some of them close to the south rail about 15 feet west of where his body was found. (Record 19-20-26-27).

The entire lower part of his face was gone; his left leg and left arm were badly mangled, so that the undertaker had to put casts on them. The little finger of his left hand was crushed. (Record 20-27-31).

Immediately south of the south rail of Track 1, there was an air pipe line on top of the ties and extending along the track for a distance perhaps of 800 feet. This air pipe line when in normal condition was fastened to the ties by clamps or spikes about 12 inches out from the south rail of the track and close to the ties, leaving no space between the pipe line and the ties to which it was fastened, and this air pipe at a point about 15 feet west of where the body was found was in a defective condition and had been for some period of time, and that for a distance of at least 15 feet the fastenings had been torn loose and the air pipe line bent inward and up from the ties, leaving a space of about 3½ or 4 inches between the ties and the air pipe line, and bent in toward the rail possibly 3 or 4 inches. (Record 39-40-41).

Defendant's Exhibit G, a picture of the front end of the rear truck of car three or the third car from the caboose was taken for the purpose of showing where the hat was found, estimated to be about 15 feet west of the body. (Record 71-72).

It was also shown that a man stepping in between the cars from the south side to couple air on a train standing as this train was, that the natural position for him to take would be to step inside the south rail with his right foot, leaving his left foot immediately outside of the rail and inside of the pipe line. (Record 41-42).

There was introduced in evidence the shoe worn by the deceased, at the time of the accident, showing a very marked rounding depression on the counter of the left shoe on the outside of the shoe running parallel with the sole of the shoe and just above the heel. That the shoes were in the same condition at the time they were taken from the body of the deceased as when offered in evidence, except that the

depression in the counter of the shoe wasn't so marked to the eye at the time of the trial, the outside leather covering the counter of the shoe having appeared to have ironed itself out to some extent. (Record 28, 29, 30, 52, 53).

The standard guage of the railroad track is 4 feet 8½ inches, and the width of the box cars such as were used on this train, 9 feet. And the length of the cars 33 to 40 feet (Record 38-39).

POINTS AND AUTHORITIES.

It will be noticed that in this case there was no motion for a new trial made in the trial court, but only a motion for judgment notwithstanding the verdict. Under these conditions the rule in our State is as expressed in the case of North West Marble Co. vs. Williams, 128 Minnesota 414:

> "The question is whether there is any competent evidence reasonably tending to support the verdict. Every intendment will be indulged in favor of the verdict and judgment will only be granted when the evidence is conclusive against the verdict."

And again in Fairmont Gas Co. vs. Crouch, 133 Minn. 167, our court said:

> "Judgment notwithstanding the verdict should be granted only where it clearly appears that the cause of action sought to be established does not in point of substance constitute a right of recovery although the evidence is insufficient to sustain the verdict. Still if it appears probable that plaintiff has a good cause of action on the merits and that the defects in the evidence *may* be supplied on another trial judgment notwithstanding the verdict should not be given. Larson v. G. N. Ry. 116, Minn. 337."

What *facts* were established by the evidence in this case were for the Jury. It is equally true that if the *inference* to be drawn from the facts proven are not certain and con-

clusive then the *inferences* proper to be drawn from such facts are for the jury.

This rule is well expressed by the late Justice Mitchell of our Supreme Court in a case that has frequently been cited by our court in this class of cases, in Abbette vs. Milwaukee, 30 Minn. 482:

> "Negligence is ordinarily a question for the jury. It is always so where the evidence on a material point is conflicting or where the facts being undisputed different minds might reasonably draw different conclusions from them. Negligence cannot be conclusively established as a matter of law upon a state of facts beyond which fair minded men of ordinary intelligence may differ as to the inference to be drawn; and when the question of negligence arises upon even a conceded state of facts from which reasonably minded men might arrive at different conclusions it must be submitted to the Jury, and if the inference to be drawn from the evidence was not certain or incontrovertible the question of negligence cannot be passed upon by the court. The evidential facts may all be admitted and yet the question of negligence not be a question for the court; for in such cases this is the main fact, the existence or non-existence of which is to be inferred from the other facts."
>
> (See also N. P. Ry. Co. vs. Egeland, 163, U. S. 93; Texas & Pac. Ry. Co. vs. Gentry, 163 U. S. 353; Sioux City & P. Ry. vs. Stout, 17 Wall, 657.

This case was tried upon and it is the theory of Respondent, that after the last cut of four cars were coupled to the train with the switch engine attached and stopped to see if the automatic coupling was properly made, Coogan having made all the other air couplings then stepped in between the caboose and the rear car to make the last air coupling, with his right foot inside the rail and his left foot outside the rail between the south rail and the air pipe line on the ties, and when in a stooping position to reach the air

hose for the purpose of coupling the same his left foot slipped backward and under the air pipe line, and before having had time to couple the air the cars started backward in the movement being made to shove them into the clear, and when he attempted to straighten up he found his foot caught beneath the air pipe line and couldn't free the same and was forced backward by the cars, fell to the ground outside the south rail, receiving the injuries causing his death.

While it is not necessary for defendant or petitioner to show the manner in which the accident happened, we call attention to the fact that there is not a suggestion or intimation in the evidence of a fact disclosed by the evidence from which it could be inferred that the accident could have happened in any other manner than the one claimed by the Respondent.

COOGAN WAS BETWEEN THE CABOOSE AND THE FIRST CAR AT THE TIME OF THE ACCIDENT.

The evidence in this case furnishes a reasonable basis for the finding that at the time of the accident Coogan was between the caboose and the car coupled thereto in an attempt to couple the air at that point. The air on this train except the last cut of four cars had all been coupled before the accident with the exception of that between the caboose and the car coupled thereto. The air coupling between the second and third cars from the caboose, and such other air couplings as were necessary to be made in other places in this string of cars were made by Coogan during the time this train was being made up. It was no part of the duty of any member of the switch crew to couple this air. While the train was being made up there was no member of the

road crew or any other person near this train except Coogan. Delehanty the other brakeman of the road crew was in the west end of the Yard down by the lead, and Jeffers, the conductor of the road crew was also in the west end of the yard. Coogan was the rear brakeman, so the other members of the road crew had nothing to do with this air coupling that had been made. It was Coogan's duty to couple this air. This fact was not disputed in the trial court or in the supreme court of the State, and it is suggested for the first time by petitioner in its brief in this court, basing it upon the answer of Dubke when speaking about the coupling made by him after the road engine had been put on and they attempted to pump up the air, referring to the coupling made between the last cut of three or four cars and the former cut of ten. That Coogan was engaged in attempting to make this last coupling between the caboose and the first car coupled thereto there can be no question. That he was at the opening between the caboose and the car coupled thereto is shown conclusively by the blood on the rear wheel of this car coupled to the caboose and by parts of his clothing being found on the bolt through the oil box journal of the same wheel. There was no blood on any other part of the train. It being his duty to make this coupling and the fact that he had made all the other couplings of the air with the exception hereinbefore referred to, and it being shown that he was at this point, it is but a fair inference that he was engaged in the performance of his duty.

POSITION COOGAN WOULD TAKE TO COUPLE AIR.

The evidence furnished a reasonable basis for the Jury to find that the natural position for Coogan to take in making this coupling was with his right foot inside the rail and his left foot outside the rail and inside the air pipe line, and

that just before the train started moving backward to pull the cars in clear, and while in a stooping position his left foot slipped beneath the air pipe line and became caught. Mr. Odekirk, who had years of experience in that line of work testified that this would be the natural position for him to take, so that he would be facing the engine and that it is customary for men when working around trains of that kind to work facing the engine or front of the train. The petitioner and defendant called Mr. Lieb, Mr. Palmer and a Mr. Hemsey. None of them had ever had any experience whatever in coupling air hose. They testified to the fact that the natural position for a brakeman to take in attempting such a coupling would be to step in with his left foot inside the rail. But the defendant did not call or ask any of its two trainmen as to the proper manner of coupling this air.

THE OPENING BETWEEN THE CABOOSE AND THE CAR COUPLED THERETO WAS OPPOSITE THE DEFECTIVE PIPE LINE.

The evidence furnished a reasonable basis for the Jury to find that the opening between the caboose and the car coupled thereto before they started to shove the train into clear, was opposite the defective condition in the air pipe line when Coogan stepped into make the coupling, and while in a stooping position his left foot became caught, slipping back under the air pipe line where there was a space of about 3½ or 4 inches between the pipe and the ties, so that the cars in starting backward forced him to the ground outside the rail and inside the pipe line, causing the injuries resulting in his death. The blood on the rear wheel of the car coupled to the caboose and the part of his clothing on the bolt through the journal of the same wheel show

conclusively that Coogan was at this opening between the caboose and the car. His body was found approximately at the west end or front end of the second car from the caboose. The blood and kicked up condition of the ground outside the south rail showed that his body had been dragged a distance of at least 15 feet. His hat was found in the neighborhood of 15 feet west of the body and beneath the rear trucks of the third car from the caboose; his teeth and tongue and pieces of flesh nearby just inside the south rail. The defective condition of the air pipe line was about 15 feet west of the body, conclusively showing that the opening between the caboose and the first car were opposite the defective condition in the air pipe line when they started to shove the train into clear. Then take into consideration that after Coogan had been forced to the ground outside the south rail he might have been carried a short distance without any evidence of dragging. The mark, or more properly speaking, the rounding depression in the counter of his left shoe on the outside of his shoe and running parallel with the sole of his shoe is convincing if not conclusive evidence of how it was caught. In this connection I wish to note that the undertaker testified that when he delivered Coogan's shoes to one of the attorneys of the Respondent, his attention was called to a rounding depression in the counter of this shoe, and also to the effect that he noticed no difference in the condition of the shoes at that time from what they were when removed from the body. The nature of Coogan's injuries themselves are strongly corroborative of the manner in which he was caught and the position in which he was when the injuries occurred. It doesn't appear that the right side of his body was injured at all to speak of. With his foot beneath the pipe he could not free the same until he was forced back by

the car so that his body became practically parallel with the pipe line and close to the ground. This would practically force his body in the space between the air pipe line and the rail with the knee part of his leg over the south rail in a bent position. The undertaker testified that his left leg was badly mashed, as he expressed it; that he had to put a cast on it. The wheel would next reach Coogan's left arm. It appears his arm was also caught by this wheel and so badly mashed that a cast had to be placed upon it. The little finger on the left hand was mashed and crushed by the wheel. The lower part of his face was mashed and gone leaving part of his tongue, false teeth and flesh just inside the south rail. The bolt through the journal box caught some part of his clothing and dragged his body for a distance of practically 15 feet when the body became detached from the cars in their backward movement, the cars finally stopping about two car lengths east of the body.

We feel that in a case of this character, based upon circumstantial evidence that the test should be not as to whether some isolated fact, in and of itself alone establishes some particular point, but does the evidence as a whole furnish a reasonable basis for the belief that the alleged negligence was the cause of the accident complained of.

Or as expressed by this court:

> "Circumstances altogether inconclusive, if, separately considered; may by their number and joint operation be sufficient to constitute conclusive proof."

AUTHORITIES.

In this line of cases I take the rule to be, that it is not necessary in any action, civil or criminal that the material facts should be established by direct evidence.

"If the circumstantial evidence in any case furnishes a reasonable basis for the inference by the Jury of the ultimate fact that the alleged negligence was the cause of the injury complained of, it is sufficient proof of causal connection to support the verdict."

Lillstrom v. N. P. Ry. Co. 53 Minn. 464;
Olson v. G. N. Ry. Co. 68 Minn. 155;
Mores v. N. P. Ry. Co. 108 Minn. 100;
Murphy v. Twin City Taxi Cab Co. 122 Minn. 363.
De Merce v. Soo, 122 Minn. 171;
Miatton v. Craghill Co. 124 Minn. 165;
Crandall v. G. N. Ry. 127 Minn. 498;
Fitzgerald v. Armour, 129 Minn. 81;
Outzelt v. C. B. & Q., 150 Minn. 398;
DuShaw v. G. N. Ry. Co., 195 NW Rep. 893;
McIntosh v. G. N. Ry., 151 Minn. 527.

See also:

Choctaw, Okl. & G. Ry. v. McDade, 191 U. S. 64;
Myers v. Pittsburgh Coal Co., 233 U. S. 184;
Union Pacific Ry. Co. v. Huxoll, 245 U. S. 534;
Gray v. Davis Dir. Gen'l., 294 Fed. 58;
Tabor v. Davis, Dir. Gen'l., 280 Fed. 612;
Sioux City Ry. Co. v. Stout, 17 Wall. 657;
Maraude v. Texas & Pac. Ry. Co., 184 U. S. 173.

In the case of Union Pacific Ry. Co. v. Huxoll, Supra, this Court said:

"The oral argument of the plaintiff in error was practically confined to the proposition that the trial court committed reversible error in submitting the question to the jury for the reason that even if it did assume that the power brake wasn't in order there was no substantial evidence in the case that this failure contributed in whole or in part to cause the death of Huxoll."

> "Demonstration is not required in such a case as we have here, but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence."

Counsel for petitioner, in their Brief cite Pittsburgh Coal Co. v. Myers, 203 Fed. 221. This case on appeal to this court was reversed.

In Myers v. Pittsburgh Coal Co., 233, U. S. 184, in reviewing the Circuit Court of Appeals, after quoting quite extensively from the opinion of the Circuit Court of Appeals, Justice Day speaking for this Court said:

> "This question however was submitted to the Jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown *in any view which can be properly taken of them* the verdict and judgment of the district court must be affirmed."

> "That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence to show that Myers came to his death by negligence of the defendant in one or more ways charged in the petition. *Considering the testimony as it must be considered in determining questions of this character in the appellate court in the most favorable aspect to plaintiff below,* we think the jury might well have found in view of the place where the body of Myers was found near the wire, with his cap gone from his head, that he came in contact with the wire and was thrown to the ground and that he survived from the contact with the wire carrying the voltage which it did, and while in this position was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car."

"We think reasonable men considering the testimony adduced might well have come to this conclusion and that it was error in the appellate court to set aside the verdict for the entire absence of testimony upon this subject. In our opinion the trial court properly left the question to the Jury upon testimony which, when fairly considered might sustain the verdict." (Italics ours).

In the case of Mores vs. N. P. Ry. Co., Supra, the court said:

"Theorize as we may on the subject of proximate cause, it is in its last analysis a question of good common sense to be solved by a practical consideration of the evidence in each particular case. If the evidence in any case leaves the question whether the negligence of the defendant was the cause of the injury a matter of conjecture, the defendant is entitled to a directed verdict. The plaintiff, however, is not required to prove the causal connection between the negligence and the injury by direct evidence, but the evidence must be something more than consistent with plaintiff's theory of how the accident occurred. If the circumstantial evidence in any case furnishes a reasonable basis for the inference by the jury of the ultimate fact that the alleged negligence was the cause of the injury complained of it is sufficient proof of causal connection to support the verdict."

In Dushaw vs. G. N. Ry. Supra, the court said:

"Of course the jury were not at liberty to conjecture how the accident happened. Plaintiff must show casual connection between the negligence alleged and the injuries suffered, but plaintiff wasn't required to establish by direct evidence if the circumstances furnished a basis not only for the inference that the accident may have happened as alleged, but also from the inference that it did so happen, and the court is of the opinion that if it did the verdict would not rest upon mere conjecture."

In speaking of inferences to be drawn from circumstantial evidence the court, in the case of Cheasepeake & Ohio Ry. vs. Ware, 95 S. E. 183, said:

> "Referring to the rule that an inference cannot be drawn from an inference or presumption, McCabe, J., in delivering the opinion of the court in Hinshaw vs. State, 147 Ind. 334 at page 363 says: 'There is an important exception to that rule, however. A *fact* in the nature of an inference may itself be taken as the basis of a new inference whether intermediate or final, provided the first inference has the required basis of *a proved* fact."

The court further says:

> "If the inference or presumption is based upon such evidence that it may be regarded as a *fact proved* in the case, then, although the evidence upon which it is based may be circumstantial evidence such inference or presumption of fact may itself form the basis for another inference of fact equally as if it had been proved by direct evidence."

Starkie on Evidence, Section 57 says: in substance:

> Since facts in issue may be proved by circumstantial evidence as well as by direct or testimonial evidence and every fact proved by circumstantial evidence is but an inference from such evidence, that where a fact is proved in a case as a fact although by inference from substantial evidence, such a fact may itself be taken as the basis for a new inference of fact.

Counsel for petitioner also cites the cases of Patton v. Tex. & Pac. Ry. Co. 179 U. S. 658; and Looney, Administratrix vs. Metropolitan Ry. Co., 200 U. S. 480; as the leading cases in support of its contention.

It seems to us that under the facts in these cases neither one of them are in point or authority in this case. In the

Patton case the court after stating the distinction in the rule between passenger and employe, also stated that the facts of an accident carried with it no presumption of negligence, and further stated that where the testimony shows the cause of an accident uncertain and shows that any one of half a dozen things may have brought about the injury for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess which of the causes produced the accident, and qualifies this statement by saying:

> "Where there is no satisfactory foundation in the testimony for the conclusion."

In the Patton case there was no evidence tending to point to any one particular cause for which the master would be responsible.

In the Looney case, Looney was killed in removing what was called a plow from beneath the street car which was used through a slot in the track to connect with the underground current when used over the Metropolitan System, and to replace the plow when removed with wires for leads to connect with the overhead or trolley system when the car was being operated over the Great Falls System. The evidence was conclusive in that case that the plow had been removed prior to the accident and that Looney was engaged in attaching the wires or leads beneath the car at the time he was killed. This court said in substance:

> Granting therefore the conductor was negligent one of two things was necessary to cause the accident; first, a leak in insulation, or second, the deceased touching the uninsulated ends of the leads. For the first the company would be liable; for the second, not.
>
> The end of the leads had to be uninsulated and there was no evidence of any defect in the leads or any leak in the insulation or that leaks were likely

to occur, or the amount or degree of inspection necessary to discover them or failure of an inspection.

It seems the case was tried and argued in the Supreme Court on the theory that Looney was killed while removing the plow, but the evidence was positive to the contrary, and that he was killed after the plow had been removed and while attaching the wires or leads.

DECEDENT DID NOT ASSUME THE RISK AS A MATTER OF LAW.

The air pipe line in this yard extended along Track No. 1 outside the rail for perhaps 800 to 1000 feet; it was a 1¾ inch pipe; it was fastened to the top of the ties by clamps or spikes about 12 inches out from the south rail and when in normal condition leaving no space between the ties and the pipe.

The evidence shows and it was admitted by defendant's witnesses that there is a space of at least 15 feet in this air pipe line which had been in a defective condition for possibly 4 or 5 months, clamps and spikes torn away, the pipe bent in and up leaving a space of 3½ or 4 inches between the ties and the pipe line.

Coogan had been on this run on Train 91 from Austin to Farmington and on Train 92 from Farmington to Austin, in the neighborhood of two months before the accident. It doesn't appear from the evidence that Train 91 was ever put away on Track 1. Train 92 was sometimes made up on the main line track, which is north of Track 1, sometimes made up on Track 1, sometimes made up on Track 2, and other times on Track 3; but there is no evidence as to how many times it had been made up on Track 1, or that Coogan ever had occasion to couple air in the immediate vicinity of

the defect in this pipe line. Under this evidence it would be going far to say that even if Coogan knew or should have known of this defect, that he should as a matter of fact have appreciated the risk and danger of his foot slipping under the pipe and being caught in the manner he was when engaged in attempting to make this coupling.

C. R. I. & P. Ry. Co. vs. Brown, 229 U. S. 317;
Tex. & Pac. Ry. Co. vs. Harvey, 228 U. S. 319;
Tex. & Pac. Ry. Co. vs. Swearingen, 196 U. S. 57;
Gila Valley R. Co. vs. Hall, 232 U. S. 94.

The case of So. Pac. Co. vs. Berkshire, 254, U. S. 415, cited by the Petitioner is not in point or authority under the facts of this case, this court having expressly stated in its opinion in the Berkshire case, in passing upon the assumption of risk in that case, that it was confining itself "to the case of Postal Cranes."

RULE IN THE KING CASE.

In the instant case there is no question of the interpretation of any Federal Act or the definition of legal principals in its application. No point is made or could be made as to any instruction given by the trial court. The only question presented was first: "Was there any evidence with the proper and legitimate inference to be drawn therefrom which furnished a reasonable basis for the finding of causal connection between the defendant's admitted negligence and Coogan's death? And second, incidentally the question of the assumption of risk. This case comes within the rule announced by this court in Chicago Jct. Ry. Co. vs. King, 222 U. S. 222, and followed in Chicago R. I. & P. Ry. Co. vs. Brown, 229 U. S. 317; G. N. Ry. Co. vs. Knapp, 240 U. S. 464; Seaboard Air Line Co. vs. Padgett, 236 U. S. 668;

So. Ry. Co. vs. Gadd., 233 U. S. 572; Baltimore & Ohio Ry. Co. vs. Whitacre, 240 U. S. 169; Seaboard Air Line vs. Kenney, 36 Sup. Ct. Rep. 458; Louisville & Nashville Ry. Co. vs. Stewart, 36 Sup. Ct. Rep. 586.

In the King case this court said:

> "That although we have jurisdiction of review because the cause of action as stated in the pleadings rested upon the safety appliance law, the questions now presented are of a character which ordinarily it was the purpose of the Judiciary Act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals.

"We do not think we are called upon to scrutinize the entire record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence to draw therefrom inferences which may possibly conflict with the conclusions of the courts below as to the tendencies of the proof."

In C. R. I. & P. Ry. Co. vs. Brown, Supra, this court said:

> "The trial court and the circuit court of appeals considering the evidence confirm the finding of the jury expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed, but such as must be pronounced to be without foundation as a matter of law."

In Baltimore & Ohio Ry. Co. vs. Whitacre, Supra, this court said:

> "The defendant requested peremptory instructions on the ground that there was not sufficient evidence to entitle plaintiff to recover. The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling."

In Louisville v. Nashville Ry. Co. vs. Stewart, Supra, this court said:

> "The railroad company contends at some length that the case should have been taken from the jury by direction of a verdict in its favor. As the opinion of both courts below and the jury were against it, and as we agree with their judgment we haven't discussed this assignment of error at length. Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong."

In this case the verdict was not a five-sixths verdict, but was the verdict of the entire jury. After due consideration of the evidence and the law, not only at the close of the testimony but also on a motion for judgment non-obstante, the verdict was approved by the trial court and on appeal the action of the trial court was affirmed by the unanimous vote of the Supreme Court.

The rule as expressed by this court in this class of cases found in Myers v. Pittsburgh Coal Co. 233, U. S. 184 and similar cases is the rule applicable to the instant case and not the rule as stated in Pittsburgh Coal Co. vs. Myers, 203 Federal.

And when we further consider the fact that the rule as stated in the King case consistently followed by this court is entirely applicable to the situation in this case it would seem to us that the judgment of the Supreme Court of the State of Minnesota should be affirmed.

We therefore respectfully submit that the judgment of the Supreme Court of Minnesota be affirmed, with legal interest and costs.

Respectfully submitted,

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